Filed 12/10/03 Johnson-Woods v. County of Riverside CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CHRISTINE JOHNSON-WOODS, Plaintiff and Appellant, v. THE COUNTY OF RIVERSIDE, Defendant and Respondent.	E032199 (Super.Ct.No. RIC348590) **OPINION**

APPEAL from the Superior Court of Riverside County. Charles D. Field, Judge. Affirmed.

Law Offices of Renée L. Campbell and Renée L. Campbell for Plaintiff and Appellant.

Bell, Orrock & Watase, Dana M. Smith; Arias, Lockwood & Gray and Christopher D. Lockwood for Defendant and Respondent.

This case stems from the tragic death of ten-year-old Jocelyn Johnson in a hit-and-run accident. Jocelyn had been taken from the custody of her mother (plaintiff Christine Johnson-Woods) and placed with an unrelated legal guardian (defendant Nettie Johnson).

Jocelyn was crossing a street with Nettie's adult son, Wilson, when a drunk driver hit and killed them both.

Johnson-Woods filed this wrongful death action against Nettie, the County of Los Angeles, and the County of Riverside (the County). She seeks to hold the County liable on the theory that it breached assorted mandatory duties, including duties to monitor and to protect Jocelyn and to respond to reports that Jocelyn was not safe in Nettie's custody.

The County moved for summary judgment, on several alternative grounds. The trial court granted the motion on the ground that Johnson-Woods lacked standing. It reasoned that a parent has standing to sue for the wrongful death of a child if -- and only if -- the parent is the child's heir, and that Johnson-Woods was not Jocelyn's heir because she never married Jocelyn's father and she never contributed to Jocelyn's support.

We find the trial court's reasoning impeccable. We also agree with another ground on which the County sought summary judgment -- that its alleged breaches were not the proximate cause of Jocelyn's death. Accordingly, we will affirm.

I

FACTUAL BACKGROUND

The following facts were shown by the declarations in support of, and in opposition to, the motion for summary judgment. Consistent with the applicable standard of review, we view the evidence in the light most favorable to the party opposing the motion -- in this case, Johnson-Woods. (*Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1150.)

Johnson-Woods did argue that some of the County's proffered evidence was hearsay. However, she never pressed the trial court for a ruling on this objection. As a result, she waived any objection to it. (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, fn. 1, disapproved on another ground in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.) Moreover, in this appeal, she does not argue that the trial court erred by considering the evidence. For this reason, too, she has waived any objection to it.

On June 27, 1989, Johnson-Woods gave birth to Jocelyn Johnson. Jocelyn was removed from her custody immediately due to her drug and/or alcohol use and placed with a foster parent, Nettie Johnson. On August 21, 1991, Nettie was appointed Jocelyn's legal guardian.

In 1996, Nettie and Jocelyn moved to Riverside County. As a result, the responsibility for supervising Jocelyn's guardianship was transferred to the Riverside County Department of Public Social Services (the Department). The Department had a case plan for supervision of the guardianship.

In 1997, Nettie applied to adopt Jocelyn. In the course of handling the adoption application, the Los Angeles County Department of Children and Family Services (DCFS) assigned social worker Dee Dee Shulman to work with Johnson-Woods.

On February 13, 1998, the Department received a referral from Shulman. Shulman alleged, among other things, that Nettie appeared to be drunk, that Nettie's adult son, Wilson, lived in the home and had a drinking problem, and that Wilson drove the

children while drunk. The referral was assigned to Riverside County social worker Melinda Eisenhart.

That same day, Eisenhart made an unannounced home visit. She stayed for two hours. Nettie had two children, in addition to Jocelyn, in her custody. Eisenhart spoke to Jocelyn alone. Jocelyn denied that Wilson lived in the home. She said she had never seen him drinking alcohol or drunk. Eisenhart also spoke separately to an older child and to Nettie, who both said the same thing. Nettie told her Wilson had not had a drinking problem for the past six to eight years.

None of Shulman's other allegations were substantiated. For example, Shulman had reported that Jocelyn's clothes were stained and full of holes. Eisenhart looked at all of her clothes and found them generally free of stains or holes. From Eisenhart's personal observations, Nettie was "very nurturing and caring," and all the children in the home were well cared for.

On February 19, 1998, Eisenhart telephoned Wilson's ex-wife, who confirmed that Wilson had not had a drinking problem for the past eight years.

On March 30, 1998, Eisenhart, accompanied by a public health nurse, made a second unannounced home visit. They were there for one hour. Wilson was present. Once again, all of the children appeared to be well cared for. Based on her investigation, Eisenhart concluded that the referral was unfounded.

On or before January 29, 1999, DCFS recommended that the adoption application be denied. Nettie therefore remained Jocelyn's legal guardian.

On July 9, 1999, the Department received a second referral from Shulman. Shulman alleged that, when Johnson-Woods had come to pick up Jocelyn for a visit, she had found Nettie drunk. James Gates, a social services supervisor with the Department, reviewed the records of the previous referral and determined that an in-person response was not appropriate.

On September 23, 1999, a car driven by 20-year-old Joshua Newton hit and killed both Jocelyn and Wilson. They were crossing the street in an unmarked crosswalk, carrying groceries, on their way home from the supermarket. Newton had been drinking. Newton pleaded guilty to two counts of gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)) and one count of failure to stop at the scene of an accident resulting in injury or death (Veh. Code, § 20001, subd. (a)).

Johnson-Woods was never married to Jocelyn's father. When asked whether she ever paid for Jocelyn's support, Johnson-Woods answered, "I took care of her . . . when I had her. I bought her clothes and shoes. And whatever she needed, I would buy for her." She admitted that she never paid any support to Nettie or to any government agency. She also admitted that did not "have any idea" of how much it cost to support Jocelyn.

II

STANDING

A parent does not necessarily have standing to sue for the wrongful death of a child. (See generally *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438-1448.) Standing to bring a wrongful death action is statutorily limited to specified categories of

persons. (Code Civ. Proc., § 377.60; *Fraizer v. Velkura* (2001) 91 Cal.App.4th 942, 945.) The only category even arguably applicable here comprises "the persons . . . who would be entitled to the property of the decedent by intestate succession." (Code Civ. Proc., § 377.60, subd. (a).)

In most cases, the heirs of a person who leaves neither a spouse nor issue (nor, since January 1, 2003, a domestic partner) are his or her parents. (Prob. Code, § 6402, subd. (b).) However, Probate Code section 6452 provides that: "If a child is born out of wedlock, neither a natural parent nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:

"(a) The parent or a relative of the parent acknowledged the child.

"(b) The parent or a relative of the parent contributed to the support or the care of the child."

Here, the County introduced evidence that Jocelyn was born out of wedlock. It also introduced evidence that Johnson-Woods had never contributed to her support. There was no contrary evidence. Johnson-Woods merely testified, "I took care of her . . . *when I had her*." (Italics added.) She admitted, however, that Jocelyn had been taken from her "on the day she was born." She also admitted that she had no idea how much Jocelyn's support cost. Token efforts at support, such as gifts, would not constitute the necessary contribution. (See Fam. Code, § 7822, subd. (b) [in proceeding to free child

from parent's custody and control, failure to support proves abandonment; "token efforts to support" do not disprove abandonment].)

In her brief, Johnson-Woods asserts that she contributed to Jocelyn's support from 1996 through 1999. She does not, however, provide any citation to the record for this (see Cal. Rules of Court, rule 14(a)(1)(c)), nor have we found any. We therefore disregard it. (*Warren-Guthrie v. Health Net* (2000) 84 Cal.App.4th 804, 808, fn. 4.)

Finally, we also note that Johnson-Woods's complaint failed to allege standing adequately. It merely alleged that she was Jocelyn's mother. It did not allege any of the additional facts that would be necessary for standing under Code of Civil Procedure section 377.60. "To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion. [Citations.]" (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265.) Accordingly, even if there were some evidence that Johnson-Woods had contributed to Jocelyn's support, the trial court properly granted summary judgment.

In sum, because Johnson-Woods never contributed to Jocelyn's support, she is not Jocelyn's heir. Because she is not Jocelyn's heir, she lacks standing to sue for Jocelyn's wrongful death.

III

PROXIMATE CAUSATION

A public entity can be held liable for a breach of a mandatory duty only if the injury was "proximately caused by its failure to discharge the duty . . . ." (Gov. Code, § 815.6; see *Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 626 [Fourth Dist., Div. Two].)

One of the grounds on which the County moved for summary judgment was that Johnson-Woods could not establish the requisite proximate causation. We may affirm the order granting summary judgment if it was correct on any ground, not merely the ground on which the trial court relied. (*JEM Enterprises v. Washington Mut. Bank, F.A.* (2002) 99 Cal.App.4th 638, 644.) Ordinarily, before doing so, we would have to give the parties an opportunity to file supplemental briefs. (Code Civ. Proc., § 437c, subd. (m)(2).) However, Johnson-Woods explicitly argued, in her opening brief, that there was sufficient evidence of causation. The County explicitly argued, in its respondent's brief, that there was not. Accordingly, supplemental briefing is not required. (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1147, fn. 7.)

"'Proximate cause involves two elements.' [Citation.] 'One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event.' [Citation.] . . . [¶] By contrast, the second element focuses on public policy considerations. Because the purported causes of an event may be traced back to the dawn of humanity, the law has imposed additional 'limitations on liability other than simple causality.' [Citation.]

'These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy.' [Citation.] Thus, 'proximate cause "is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct."' [Citation.]" (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045, quoting *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315-316, quoting *Mosley v. Arden Farms Co.* (1945) 26 Cal.2d 213, 221.)

"In the absence of 'overriding policy considerations . . . foreseeability of risk [is] of . . . primary importance in establishing the element of duty.' [Citations.] As a classic opinion states: 'The risk reasonably to be perceived defines the duty to be obeyed.' [Citation.] Defendant owes a duty, in the sense of a potential liability for damages, only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent, in the first instance. [Citations.]" (*Dillon v. Legg* (1968) 68 Cal.2d 728, 739, quoting *Grafton v. Mollica* (1965) 231 Cal.App.2d 860, 865 and *Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339, 344 [162 N.E. 99], respectively.)

Foreseeability is equally important in establishing the element of proximate causation. (See *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 55-56.) "Like duty, proximate cause reflects a judgment regarding the permissible extent of liability for negligence. [Citation.] It limits the defendant's liability to those foreseeable consequences that the defendant's negligence was a substantial factor in producing." (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1342.)

"It is well established that when a defendant's negligence is based upon his or her having exposed the plaintiff to an unreasonable risk of harm from the actions of others, the occurrence of the type of conduct against which the defendant had a duty to protect the plaintiff cannot properly constitute a superseding cause that completely relieves the defendant of any responsibility for the plaintiff's injuries." (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 725.) Conversely, however, the occurrence of a *different* type of third-party conduct, *outside* the scope of the risk created by the plaintiff, *can* constitute a superseding cause.

For example, in *Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, the defendant left his car parked in a yellow loading zone for most of the day, in violation of a city ordinance that limited parking in a loading zone to 24 minutes. The plaintiff, riding her bicycle in the street next to the curb, had to swing left to go around the defendant's car. When she did so, she was hit by a passing car. The trial court granted summary judgment in favor of the defendant. (*Id*. at p. 348.)

The appellate court affirmed. It held, "as a matter of law, that parking beyond the time limit imposed by the ordinance could not have proximately caused the accident in this case." (*Capolungo v. Bondi*, *supra*, 179 Cal.App.3d at p. 355.) It explained: "[A]ny excess in the length of time [defendant]'s car was parked in the yellow zone had no causal connection with the accident. [Plaintiff] would have had to swerve around the car in exactly the same manner whether it had been parked there five minutes or five hours. [Citation.]" (*Id*. at p. 354.)

Similarly, in *Wawanesa Mutual Ins. Co. v. Matlock* (1997) 60 Cal.App.4th 583, 17-year-old Timothy Matlock gave a pack of cigarettes to his friend, 15-year-old Eric Erdley. While Eric was smoking one of the cigarettes, a younger boy jostled his arm, causing him to drop the cigarette, which in turn caused a large fire. (*Id*. at p. 585.) Timothy was held liable for the damage done by the fire, based on his violation of the statute which makes it unlawful to give cigarettes to minors. (*Id*. at p. 586.)

The appellate court reversed, based on lack of foreseeability. It explained: "Foreseeability . . . is often involved in the determination of both duty and proximate cause. Courts must 'approach the problem as one of determining the nature of the duty and the scope of the risk of the negligent conduct.' [Citation.] More specifically, when an injury is the product of the intervening act of a third person, the test is whether the particular manner in which the third person acted is one of the hazards that makes an actor negligent. [Citation.] [¶] In the present case, the concatenation between Timothy's initial act of giving Eric a packet of cigarettes and the later fire is simply too attenuated to show the fire was *reasonably* within the scope of the risk created by the initial act. [Citation.]" (*Wawanesa Mutual Ins. Co. v. Matlock*, *supra*, 60 Cal.App.4th at p. 588, quoting *Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 241.) "Someone who gives someone else a cigarette -- even if the act of giving is itself unlawful by virtue of the receiver's age -- hardly can become an insurer of any property which the cigarette may by some happenstance ignite. There must be some reason to conclude that the act of giving the cigarette creates a *fire hazard*. Here, however, [plaintiff] points to nothing,

other than Eric's age. Eric's *age*, however, had nothing to do with the actual fire. A *50-year-old* could just as easily have dropped a cigarette if bumped." (*Wawanesa Mutual Ins. Co.,* at p. 589.)

The crux of Johnson-Woods's position is that "[the County] failed to remove [Jocelyn] from the home of Nettie Johnson, and as a result, Jocelyn died while she was in the care of Wilson Johnson, the alleged alcoholic." Certainly this failure was the "but-for" cause of Jocelyn's death -- if she had not been left in Wilson's care, presumably she would not have been crossing that particular street at that particular time. The issue is whether it was, in addition, the proximate cause.

The County submitted an exhaustive account of the police investigation of the accident. If Wilson had been drinking, it is inconceivable that that fact would have been omitted. Thus, the County's evidence affirmatively demonstrated that Wilson was not under the influence of alcohol when the accident occurred. The accident occurred because Newton -- not Wilson -- was drunk, and he failed to yield to two pedestrians in a crosswalk. Wilson was guilty of contributory negligence, at worst, in failing to see and/or failing to yield to Newton's speeding car. The County had no reason to suppose that Wilson, when sober, could not conduct Jocelyn safely across a street. Accordingly, even assuming the County breached its mandatory duties and thereby created an unreasonable risk of harm, the harm that actually resulted was not within the scope of the risk the County created.

We conclude that the County was also entitled to summary judgment because it established that its alleged breaches of its mandatory duties were not the proximate cause of Jocelyn's death.

IV

DISPOSITION

The judgment is affirmed. The County is awarded costs on appeal against Johnson-Woods. (See *Fuller v. State of California* (1969) 1 Cal.App.3d 664, 670.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P.J.

We concur:

WARD
J.

KING
J.